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LEBAS TECHNOLOGIES SDN BHD v. MALAYSIAN BIO-EXCELL SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
DARRYL GOON SIEW CHYE JC
[ORIGINATING SUMMONS NO: WA-24C(ARB)-46-09-2017]
25 JUNE 2018

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ARBITRATION: *Award – Stay – Stay application to enforce award – Whether award yet to become binding on parties – Whether plaintiff estopped from enforcing award – Whether plaintiff unjustly enriched if award enforced – Whether there was approbation and reprobation – Whether there was risk of outcome of any appeal rendered nugatory should award be enforced – Whether court's inherent powers to order stay should not be grafted on matters within ambit of Arbitration Act 2005 – Whether orders sought by defendant within provision of s. 39 of Arbitration Act 2005*

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The defendant entered into an agreement ('the agreement') with one Metabolic Explorer Sdn Bhd ('Metabolic') to, *inter alia*, design and commission a biotechnology facility. Pursuant to an engineering, procurement, construction and commissioning contract ('EPCC contract') the defendant appointed the plaintiff to carry out certain works in relation to the defendant's contract with Metabolic. Subsequently, the defendant terminated its construction contract with the plaintiff. The plaintiff disputed this termination and the dispute was brought to arbitration before an arbitral tribunal of three arbitrators ('the first arbitration'). Pursuant to this first arbitration, the defendant was ordered to pay the plaintiff a certain amount, including payment for certain equipment that the plaintiff was to secure under the EPCC contract. The plaintiff sought to enforce the award pursuant to s. 38 of the Arbitration Act 2005 ('the Arbitration Act'). The defendant, however, became concerned that if it paid out the moneys ordered by the arbitrators, there was nothing to ensure that the plaintiff would deliver or cause the delivery of the equipment purchased. Following the award, the defendant commenced legal action against the plaintiff over the issue of the equipment ('Suit 87'). In response to this action, the plaintiff contended that the issue in dispute was related to the EPCC contract and therefore the dispute should be referred to arbitration. Suit 87 was stayed pending disposal of the dispute between the parties by arbitration ('the second arbitration'). In this originating summons, the defendant filed a notice of application in encl. 9, seeking to stay the plaintiff's application to enforce the award, or in the alternative, to suspend the enforcement of the award pending the disposal of an intended arbitration between the parties. The defendant characterised his contention by maintaining that the issues in the second arbitration was

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'inextricably connected' to the award and that a decision only in relation to payment was still not complete and thus not yet binding because the connected issue of delivery had not been determined. The defendant asserted that (i) the plaintiff was estopped from enforcing the award for payment until the equipment was secured; (ii) in maintaining that the dispute over the equipment under the EPCC contract should be arbitrated and, at the same time, apply to enforce the arbitration award, the plaintiff was both approbating and reprobating; (iii) should the order for payment in the arbitration award be enforced it would result in the plaintiff being unjustly enriched and (iv) the court retained an inherent jurisdiction to stay the enforcement of an arbitration award upon the principles in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* ('*Kosma Palm Oil'*).

Held (dismissing application in encl. 9):

(1) In seeking to stay the plaintiff's application to enforce or to suspend the enforcement of the award, the defendant had not only invoked s. 39(1)(a)(vii) of the Arbitration Act 2005, but also principles beyond the Arbitration Act such as estoppel, unjust enrichment and the court's inherent jurisdiction. Section 39(1) of the Arbitration Act permits a refusal to recognise or enforce an arbitration award. It does not, however, provide for any stay of an application to enforce or a suspension of the enforcement of an arbitration award. The orders sought by the defendant were therefore not within the provisions of s. 39 of the Arbitration Act. (paras 22 & 26)

(2) Insofar as s. 39(1)(a) (vii) of the Arbitration Act was concerned, it could not be maintained that the award had yet to become binding. It was a fallacy to suppose that merely because the issues in dispute in the second arbitration were somehow connected to those in the first arbitration, and thus the award, *ergo* the award had not yet become binding on the parties. This was a *non sequitur*. While the dispute in the first arbitration and the dispute in the second arbitration may stem from the same EPCC contract, they were nonetheless discrete and distinct disputes. The first arbitration was concerned with payment while the second arbitration was concerned with equipment. Whatever the outcome of the second arbitration, the award would remain as it was. Therefore, there was no legitimate basis upon which it may be contended that the award had not yet become binding on the parties. (paras 29-31 & 34)

(3) It could not be said that the plaintiff had reprobated and approbated merely because it had agreed that the dispute over the equipment should be the subject matter of an arbitration. This was merely because that dispute, like the dispute in the first arbitration, stemmed from the same EPCC contract in respect of which there was an arbitration agreement.

The disputes were different in substance. Equally it could not be contended that allowing the enforcement of the award would somehow contradict the order given by the court to stay Suit 87 pending the second arbitration. The stay granted was for a second and different dispute. (paras 47 & 48)

(4) Payment under the award could not somehow be said to unjustly enrich the plaintiff. The order for payment was made by a dispute resolution process and by arbitrators agreed upon by the parties. It was a finding that the plaintiff was entitled to the payment ordered by reason of the defendant's wrongful termination of the EPCC contract. Hence, it was compensation for a breach of contract. (para 52)

(5) The court's inherent powers to order a stay as amplified in cases such as *Kosma Palm Oil* should not be grafted on to matters that legitimately fall within the ambit of the Arbitration Act. Nothing in the Arbitration Act admits of a stay of enforcement predicated upon special circumstances that would normally afford a stay of execution in respect of a judgment of a court. The application in encl. 9 was not for a stay in its true sense. There was no pending appeal against the award. Therefore, there was no risk of the outcome of any appeal being rendered nugatory should the award be enforced. There was also no application to set aside the award. Accordingly, there was no reason why enforcement of the award should be stayed. (paras 53 & 54)

Case(s) referred to:

Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

LW Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd and Another Appeal [2012] SGCA 57 ***(refd)***

Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal [2016] 4 CLJ 12 FC ***(refd)***

NCC International AB v. Alliance Concrete Singapore Pte Ltd [2008] 2 SLR 565 ***(refd)***

Pepper (Inspector of Taxes) v. Hart and Related Appeals [1993] 1 All ER 42 ***(refd)***

Sunway Damansara Sdn Bhd v. Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872 ***(refd)***

Westminster City Council v. National Asylum Support Service [2002] 4 All ER 654 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 8, 35, 36, 38, 39(1)(a)(vii)

For the plaintiff - Tharmini Paramasivan & Sivabalan Sankaran; M/s Tan Swee Im, Siva & Partners

For the defendant - J Vicknaraj & PX Leong; M/s Vicknaraj, RD Ratnam Rajesh Kumar & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Darryl Goon Siew Chye JC:

[1] On 2 February 2015, pursuant to and following an arbitration between the parties, the plaintiff secured an arbitration award against the defendant. This arbitration award is headed as a "final award" and shall simply be referred to as the "award" hereinafter.

[2] The order, which is set out in para. 167 of the award, states as follows:

> 167. The Tribunal therefore orders the Respondent
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> [Defendant] to pay the Claimant [Plaintiff] (a) the sum of RM6,559,440.37, being a part of the Claimant's [Plaintiff's] claim, with interest on that sum at the rate of 5% per annum from the date of this Final Award until the date of full payment, and (b) the costs of this arbitration in the sum of RM601,850.

[3] Having secured the award, and by the originating summons herein, the plaintiff now seeks to enforce it pursuant s. 38 of the Arbitration Act 2005 ("Arbitration Act") .

[4] However, in this originating summons, the defendant has filed a notice of application in encl. 9. By this application, the defendant seeks to stay the plaintiff's application to enforce the award or, in the alternative, to suspend the enforcement of the award, pending the disposal of an intended arbitration between the parties. It is the defendant's application in encl. 9 that is being considered here.

Background

[5] On 1 November 2010 the defendant entered into a build, lease and transfer agreement with one Metabolic Explorer Sdn Bhd ("Metabolic") to design, build, equip, test and commission a biotechnology facility for the production of propanediol on a piece of land in Johor Bahru.

[6] In turn, and pursuant to an Engineering, Procurement, Construction and Commissioning Contract dated 21 June 2011 ("EPCC contract"), the defendant appointed the plaintiff, to carry out certain works in relation to the defendant's contract with Metabolic. The works are defined in the EPCC contract and it included the procurement of certain equipment.

[7] On 15 March 2013 the defendant terminated its construction contract with the plaintiff. The plaintiff disputed this termination. The dispute was then brought to arbitration before an arbitral tribunal of three arbitrators. For reasons that will be clear later, I shall refer to this arbitration as the first arbitration.

[8] It was pursuant to the first arbitration that the award and the order that is set out above, was made. As can be seen, the order made by the learned arbitrators was for the payment of money. However, this monetary award included payment for certain equipment that the plaintiff was to secure under the EPCC contract.

[9] After the award, the defendant became concerned that if it paid out the moneys ordered by the arbitrators, there is nothing to ensure that the plaintiff will deliver or cause the delivery of the equipment purchased. The equipment in question were a salts removal process from Buss SMS Canzler Gmbh and a water removal process from GEA Wiegand Gmbh. For convenience, hereinafter, they shall remain collectively referred to as the equipment.

[10] The defendant was also particularly concerned that the plaintiff is a special purpose vehicle incorporated in this country especially for the EPCC contract. Its parent company is established in France. Now that the EPCC contract is over there is little, if anything, left in the plaintiff. If the plaintiff fails to deliver the equipment after payment, there is hardly any opportunity to obtain any realistic recourse against the plaintiff. The defendant's concern is therefore understandable.

[11] Following the award, the defendant commenced legal action against the plaintiff over the issue of the equipment. This was *vide* a Kuala Lumpur High Court Civil Suit No. WA-22-87-08-2017 ("Suit 87").

[12] In response to this action, the plaintiff contended that the issue in dispute is related to the EPCC contract and therefore the dispute should be referred to arbitration.

[13] By an order of the court of 15 November 2017, Suit 87 was stayed pending disposal of the dispute between the parties by arbitration, before the same arbitrators in the first arbitration. This then would be a second arbitration between the parties ("second arbitration").

[14] The notice to arbitrate issued by the defendant in the second arbitration is as follows:

(b) The Notice to Arbitrate

(a) Whether pursuant to the EPCC Contract, Bio-Xcell is entitled to the legal and/or beneficial ownership of the Equipment upon payment of the Arbitration Sum Awarded;

(b) Whether Bio-Xcell's right to the equipment is incidental and consequential to the decision of the Learned Arbitrators in giving full value to the Equipment based upon the final account;

(c) Whether Lebas's right to payment of the Arbitration Sum Awarded co-exists with a reciprocal obligation on the part of Lebas to deliver and/or transfer of ownership of the Equipment to Bio-Xcell;

(d) Whether the Arbitration Award is conditional upon and/or is subject to Lebas's ability to deliver and/or transfer ownership of the Equipment to Bio-Xcell; and

(e) Whether in the event of Lebas's inability to deliver and/or transfer of ownership of the Equipment to Bio-Xcell, Lebas is estopped and/or precluded from enforcing the Arbitration Award and/or is liable to account to Bio-Xcell for monies paid by Bio-Xcell to Lebas in respect of the said Equipment.

The Defendant's Case

[15] The defendant raised several arguments in support of its application. The first is predicated on a contention that the award has not yet become binding. This is a contention that invokes s. 39(1)(a)(vii) of the Arbitration Act 2005 ("Arbitration Act").

[16] Section 39(1)(a)(vii) of the Arbitration Act states as follows:

Grounds for refusing recognition or enforcement

39. (1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked:

(a) where that party provides to the High Court proof that

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;

[17] In invoking this provision of the Arbitration Act, counsel for the defendant characterised his contention by maintaining that the issues in the second arbitration is "inextricably connected" to the award. Both payment and delivery of the equipment are directly connected and hence, a decision only in relation to payment is still not complete and thus not yet binding because the connected issue of delivery has yet to be determined.

[18] Secondly, the defendant asserts that the plaintiff is estopped from enforcing the award for payment until the equipment are secured for the plaintiff by the defendant. This is because in the arbitration, there was no dispute that the plaintiff was to deliver the equipment. The representation was that the equipment were ready to be delivered. The defendant further contends that in its letter to the defendant of 2 March 2015, the plaintiff had agreed to use its best endeavours to arrange for the transfer to the defendant of the ownership rights in the equipment procured for the defendant by the plaintiff. There would also be a risk of inconsistency if the payment is enforced but the equipment not delivered. Counsel for the defendant, however, concedes that the award itself does not pay payment thereunder conditional upon delivery of the equipment.

[19] Thirdly, the defendant contends that, in maintaining that the dispute over the equipment under the EPCC contract should be arbitrated and, at the same time, applying to enforce the arbitration award, the plaintiff is both approbating and reprobating. These two positions taken are not consistent. In the circumstances of this case, according to the defendant, to allow the enforcement of the award would be inconsistent with the order for stay pending arbitration in Suit 87.

[20] Fourthly, should the order for payment in the arbitration award be enforced it would result in the plaintiff being unjustly enriched. The plaintiff would have secured payment without having the equipment delivered.

[21] Fifthly, in addition, the defendant contends that the court retains an inherent jurisdiction to stay the enforcement of an arbitration award upon the principles enunciated by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1.

[22] Thus, in seeking to stay the plaintiff's application to enforce or to suspend the enforcement of the award, the defendant has not only invoked s. 39(1)(a)(vii) of the Arbitration Act but also principles beyond the Arbitration Act such as estoppel, unjust enrichment and the court's inherent jurisdiction.

The Plaintiff's Case

[23] The plaintiff refutes these contentions of the defendant.

[24] Directly put, the plaintiff's argument is that the court has no jurisdiction or power to refuse to enforce the award except as provided under the Arbitration Act. The only orders that the court may make, and the only grounds that are permitted therefor, are those found in the Arbitration Act. The orders sought and the grounds relied upon by the defendant are not provided in the Arbitration Act.

[25] The plaintiff further contends that the award is not conditional and is discrete from the dispute in the second arbitration or any award that may be made thereunder. The award is not conditional in any way and it therefore cannot be maintained that the award has not yet become binding but is somehow dependant on the outcome of the second arbitration.

Section 39(1)(a)(vii) Of The Arbitration Act

[26] Section 39(1) of the Arbitration Act permits a refusal to recognise or enforce an arbitration award. It does not provide for any stay of an application to enforce or a suspension of the enforcement of an arbitration award. At the risk of being pedantic, the orders sought by the defendant are therefore not within the provisions of s. 39 of the Arbitration Act.

[27] However, the defendant has invoked s. 39(1)(a)(vii) of the Arbitration Act. If this is warranted, it would mean the court may refuse to enforce the award. Whether it be a stay or suspension, I suspect, would matter not to the defendant.

[28] It is also significant that the defendant has not made any application to set aside the award itself.

[29] Insofar as s. 39(1)(a)(vii) itself is concerned, can it be maintained that the award has yet to become binding? I am of the view that it cannot. With respect to learned counsel for the defendant, I think it is a fallacy to suppose that merely because the issues in dispute in the second arbitration are somehow connected to those in the first arbitration, and thus the award, *ergo* the award has not yet become binding on the parties. This is a *non sequitur*.

[30] While the dispute in the first arbitration and the dispute in the second arbitration may stem from the same EPCC contract, they are nonetheless discrete and distinct disputes. This would be so even if in the second arbitration, findings of fact or issues raised in the first arbitration are to be relied upon. The first arbitration was concerned with payment. The second arbitration is concerned with the equipment.

[31] From the notice to arbitrate, there appears to be an attempt to link the issues in dispute in the second arbitration to the first arbitration. Yet, this still does not make the award dependent or conditional upon the outcome of the second arbitration. Whatever the outcome of the second arbitration, the award will remain as it is. Particularly, since there is no application to either set aside or suspend the award itself.

[32] To this point, I am also mindful of the provision in s. 36 of the Arbitration Act which provides thus:

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> 36 (1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.
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> (2) The arbitral tribunal shall not vary, amend, correct, review, add to or revoke an award which has been made except as specifically provided for in section 35.

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[33] In addition, there is no evidence led or argument raised to suggest that there is or has been any application made under s. 35 of the Arbitration Act to correct or interpret the award or for any additional award in the first arbitration.

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[34] Therefore, in the circumstances of this case, I find that there is no legitimate basis upon which it may be contended that the award has not yet become binding on the parties.

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Contentions Beyond The Arbitration Act

[35] Apart from the reliance on s. 39(1)(a)(vii) of the Arbitration Act, the defendant's case is also based on contentions and principles beyond the provisions of the Arbitration Act.

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[36] As learned counsel for the plaintiff submitted, s. 8 of the Arbitration Act is clear. It states in no uncertain terms:

> 8. No court shall intervene in matters governed by this Act, except where so provided in this Act.

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[37] The Arbitration Act therefore has the flavour of being an exclusionary legislation. It leaves very little avenue for the courts to intervene. Similar to the situation in Singapore, as expressed by Sundaresh Menon JA (as he then was), "... in situations expressly regulated by the Act, the courts should only intervene where so provided in the Act..." (See *LW Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd and Another Appeal* [2012] SGCA 57; see also *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693; [2018] 1 MLJ 1 generally and at p. 115).

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[38] To paraphrase the Singapore Court of Appeal in *NCC International AB v. Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565, the court has a conspicuously circumscribed role in arbitration proceedings governed by the Arbitration Act. As was pointed out by Asiah Ali J (as Her Ladyship then was) in *Sunway Damansara Sdn Bhd v. Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872:

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> I am of the opinion that the extent of the court's power to intervene is limited to what is expressed in the said provision, which is, unless the Act provides otherwise the court cannot intervene.

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[39] In regard to arbitral awards, there are specific grounds provided under s. 39 of the Arbitration Act as to when their recognition or enforcement may be refused. This leaves no room for the courts to admit of other grounds not provided. To do so would run counter to the legislative intent of the Arbitration Act. I would add that the legislative intent, even from the provisions of the Arbitration Act itself, is sufficiently apparent.

[40] To reinforce this view of the Arbitration Act, counsel for the plaintiff placed before me the Arbitration Bill 2005. This was with the intention of drawing the court's attention to the explanatory statement on the proposed amendment that led to s. 8 of the Arbitration Act in its current form.

[41] Since the decision of the House of Lords in *Pepper (Inspector of Taxes) v. Hart and Related Appeals* [1993] 1 All ER 42, the courts' reluctance to consider extraneous material to aid in statutory construction has somewhat abated (See also for example the decisions of the Federal Court in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2017] 4 CLJ 265; [2018] 2 MLJ 590 and *Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal* [2016] 4 CLJ 12; [2016] 2 MLJ 309). However, in *Pepper v. Hart*, this latitude given was in respect of parliamentary material and, only when the legislation is ambiguous or obscure or when the literal meaning led to absurdity.

[42] Since *Pepper v. Hart*, the latitude given to enable consideration of extraneous material continued. In *Westminster City Council v. National Asylum Support Service* [2002] 4 All ER 654, Lord Steyn observed that, "... since explanatory notes are now sometimes placed before the House, it would be sensible to clarify their status". This, Lord Steyn did in the following terms:

at 657:

> [5] The question is whether in aid of the interpretation of a statute the court may take into account the explanatory notes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen. In regard to contractual interpretation this was made clear by Lord Wilberforce in *Prenn v. Simmonds* [1971] 3 All ER 237 at 240-241, [1971] 1 WLR 1381 at 1384-1386, and in *Reardon Smith Line Ltd v. Hansen-Tangen*, *Hansen-Tangen v. Sanko Steamship Co* [1976] 3 All ER 570 at 574, [1976] 1 WLR 989 at 995-996. Moreover, in his important judgment in *Investors Compensation Scheme Ltd v. West Bromwich Building Society, Investors Compensation Scheme Ltd v. Hopkin & Sons (a firm), Alford v. West Bromwich*

Building Society, Armitage v. West Bromwich Building Society [1998] 1 All ER 98 at 114-115, [1998] 1 WLR 896 at 912-913, Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account. The same applies to statutory construction. In *River Wear Comrs v. Adamson* (1877) 2 App Cas 743 at 763, [1874-80] All ER Rep 1 at 11, Lord Blackburn explained the position as follows:

> I shall ... state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.

Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. In so far as the explanatory notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose explanatory notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, government Green or White Papers, and the like. After all, the connection of explanatory notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see *Cross Statutory Interpretation* (3rd edn, 1995) pp 160-161. If used for this purpose the recent reservations in *dicta* in the House of Lords about the use of Hansard materials in aid of construction are not engaged: see *R v. Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195 at 226-227, [2001] 2 AC 349 at 407, *Robinson v. Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] All ER (D) 364 (Jul), in particular per Lord Hoffmann (at [40]). On this basis the constitutional arguments which I put forward extra judicially are also not engaged: see '*Pepper v. Hart; A Re-examination*' (2001) 21 OJLS 59.

[43] I am of the view that it is both reasonable and makes logical sense for a court of law to be able to refer to explanatory statements in aid of statutory interpretation – specifically for the purpose expressed by Lord Steyn, that is, to "... cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed ..." However, and I stress, I do not suggest that what appears in explanatory statements may somehow be used

to negate or defeat clear and express provisions in a statute. For the purposes of this case, if they are to be used, it would only be to support or reinforce the view that is generally held that the legislative regime of the Arbitration Act is to minimise, and in situations where express provisions exist, to exclude, intervention by the courts. It is for this limited purpose that I am willing to refer to the explanatory statement pertaining to the Arbitration Act submitted by counsel for the plaintiff.

[44] In relation to s. 8 of the Arbitration Act, the explanatory statement of the Bill states as follows:

> Clause 3 seeks to amend section 8 of the Act 646 to adopt, with modification, the language used in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985. This provision is to limit court intervention to situations specifically covered by Act 646 and to discourage the use of inherent powers.

[45] Regrettably, the last sentence in the explanatory statement could have been better worded. Nevertheless, the idea is still consistent with the view that is generally espoused and that is, in situations where there are express provisions in the Arbitration Act, there is no room for judicial intervention.

[46] Quite apart from whether the court may interfere upon the bases submitted by learned counsel for the defendant, I am also of the view that these bases are not made out.

[47] It cannot be said that the plaintiff had reprobated and approbated merely because it had agreed that the dispute over the equipment should be the subject matter of an arbitration. This is merely because that dispute, like the dispute in the first arbitration, stems from the same EPCC contract in respect of which there is an arbitration agreement. However, the two disputes are different in substance. One concerns the right to payment while the other, the right in and to be provided the equipment.

[48] Equally, it cannot be contended that allowing the enforcement of the award would somehow contradict the order given by the court to stay Suit 87 pending the second arbitration. Again, the stay granted was for a second and different dispute – *albeit* emanating from the same EPCC contract.

[49] Insofar as the estoppel that is sought to be invoked by the defendant is concerned, learned counsel for the plaintiff pointed out that there was never any agreement or promise by the plaintiff that it would be obliged to secure the equipment for the defendant. What the plaintiff agreed to do was set out in a letter dated 2 March 2015 which was referred to by the parties. The relevant paragraphs of this letter state as follows:

A However our client is amenable to assist and facilitate your client to obtain a transfer of the ownership rights to the equipment. For that purpose, our client is prepared to execute a disclaimer of ownership to the equipment supplied by Buss SMS Canzler and GEA Wiegand. As regards the ABB equipment, the supplier's sub-contract was mainly for the development of specific software directly customised for Metex's
B processes. For confidentiality reasons, our client is not entitled to transfer data as they do not hold the intellectual property of Metex's process. If you need to have the rights transferred, your client will have to get the approval and endorsement of Metex before our client can assist your client in transferring the rights to the ABB equipment.

C All the above will necessarily take time to achieve and our client will use their best endeavours to arrange for the transfer of the ownership rights. Our client's assistance is without prejudice to all their rights under the Final Award and therefore is not and cannot be taken to mean your client need not pay the awarded sum until the rights are finally transferred. It is our client's position the award sum as requested in our letter of
D 23.2.2015 should be paid by the date stated therein.

[50] As can be seen, the offer of assistance was specifically made without prejudice to the plaintiff's rights under the award. In addition, I would add that there is also nothing to suggest that the award was made because reliance was placed on some representation by the plaintiff.

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[51] Learned counsel for the plaintiff also pointed out that it was a finding by the learned arbitrators that the reason the defendant did not receive one of the equipment sent to it was due to the defendant's own fault. After considering the arguments and evidence, the learned arbitrators in the award made clear their finding in the following terms:

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> 90. The Tribunal therefore finds that it was the Respondent's fault [Defendant] that this equipment was shipped back and that therefore the Project Manager was not justified in giving zero value for it.

[52] With respect to learned counsel for the defendant, payment under the
G award cannot somehow be said to unjustly enrich the plaintiff. The order for payment was made by a dispute resolution process and by arbitrators agreed upon by the parties. It is a finding that the plaintiff is entitled to the payment ordered by reason of the defendant's wrongful termination of the EPCC contract. Hence, it is compensation for a breach of contract. There is no
H reason why this may be said to be an unjust enrichment. In addition, the evidence is that the plaintiff was to procure the equipment for the defendant from Buss SMS Canzler Gmbh and GEA Wiegand Gmbh. There is no evidence to suggest that the plaintiff has kept or will get to keep the equipment in question.

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[53] It is also because of the nature of the legislative regime discussed above that I am of the view that the court's inherent powers to order a stay as amplified in cases such as *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1, should not be grafted on to matters that legitimately fall within the ambit of the Arbitration Act. Nothing in the Arbitration Act admits of a stay of enforcement predicated upon special circumstances that would normally afford a stay of execution in respect of a judgment of a court.

[54] In any event, in the circumstances of this case, the application in encl. 9 is not for a stay in its true sense. There is no pending appeal against the award. Therefore there is no risk of the outcome of any appeal being rendered nugatory should the award be enforced. There is also no application to set aside the award. Accordingly, there is no reason why enforcement of the award should be stayed.

[55] To my mind, what the defendant is truly seeking in this case is to be secured. It wants to be certain that when it pays the plaintiff under the award, it will receive the equipment that it intended to secure under the EPCC contract. However, what the defendant seeks is not within the purview of s. 39 of the Arbitration Act. Indeed, if the issues in dispute in the second arbitration could have been, or was, addressed and resolved in the first arbitration, the problem presented in this case would not have arisen.

[56] For the reasons given above, the defendant's application in encl. 9 is dismissed. After hearing learned counsel for the parties on the issue of costs, I order cost of RM20,000 to the plaintiff.